

# **ESTABLISHING A LAWFUL UNBUNDLING REGIME**

December 1, 2004

The Commission cannot lawfully find impairment in a market  
“where the element in question – though not literally  
ubiquitous – is significantly deployed on a competitive basis.”

*USTA I*, 290 F.3d at 422

## **CLECs HAVE DEPLOYED EXTENSIVE FIBER NETWORKS**

- As of 2003, CLEC networks consist of 324,000 route miles, an increase of 84% from 2001
- As of 2003, there were an average of 19 CLEC networks in the top 50 MSAs, an increase of 30% from 2001
- As of 2003, CLECs have deployed at least one network in 140 of the top 150 MSAs

**Metro Atlanta, GA**  
Known CLEC Fiber Routes

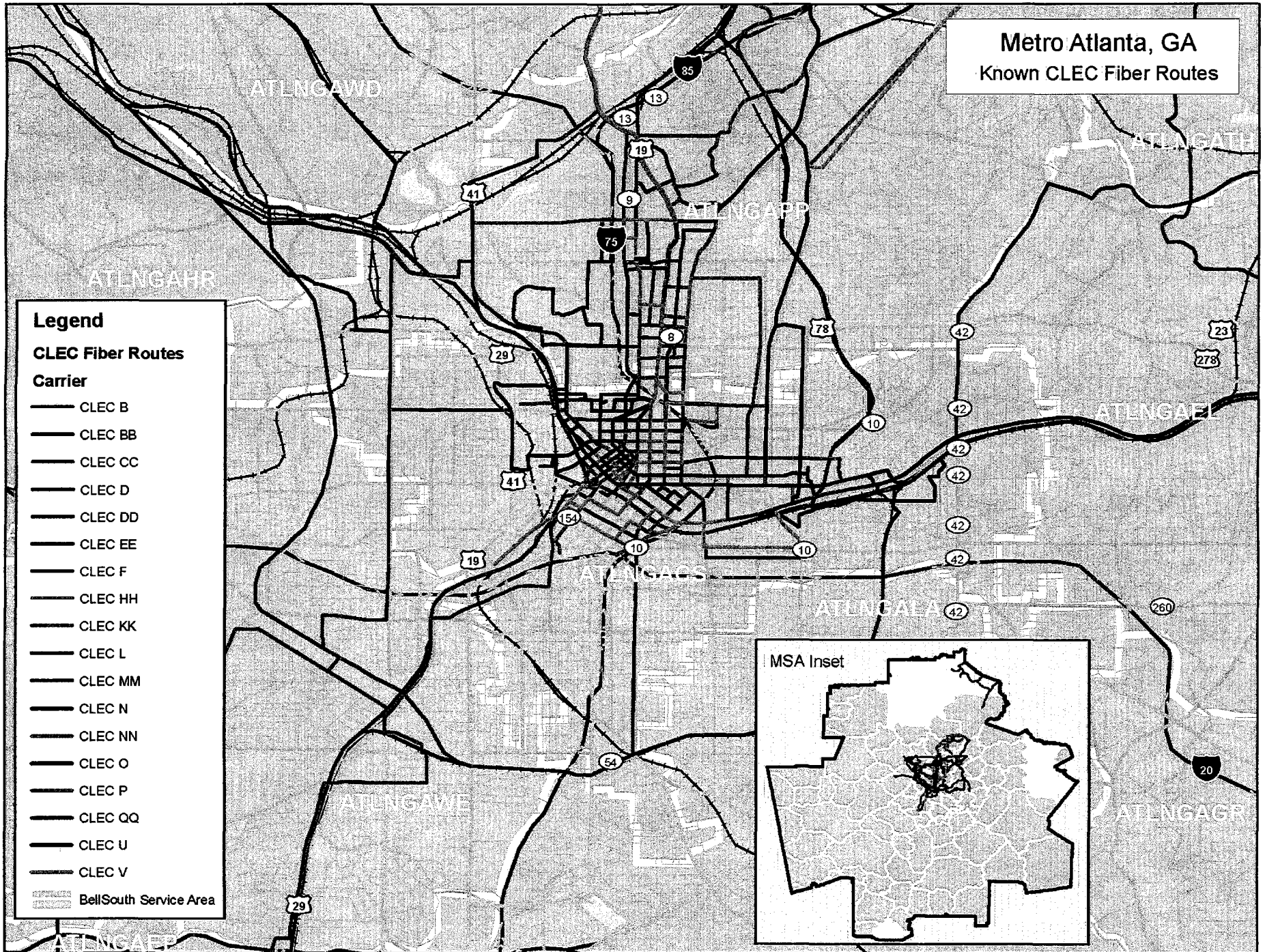
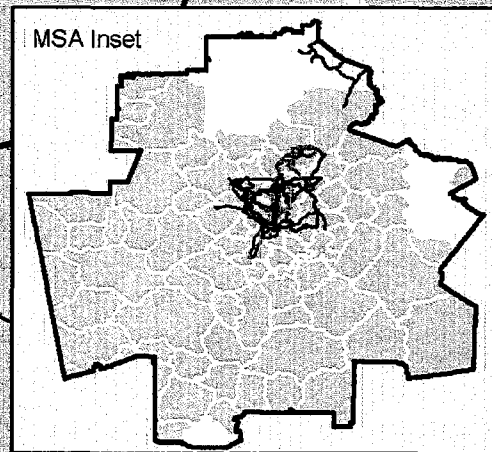
**Legend**

**CLEC Fiber Routes**

**Carrier**

- CLEC B
- CLEC BB
- CLEC CC
- CLEC D
- CLEC DD
- CLEC EE
- CLEC F
- CLEC HH
- CLEC KK
- CLEC L
- CLEC MM
- CLEC N
- CLEC NN
- CLEC O
- CLEC P
- CLEC QQ
- CLEC U
- CLEC V

 BellSouth Service Area



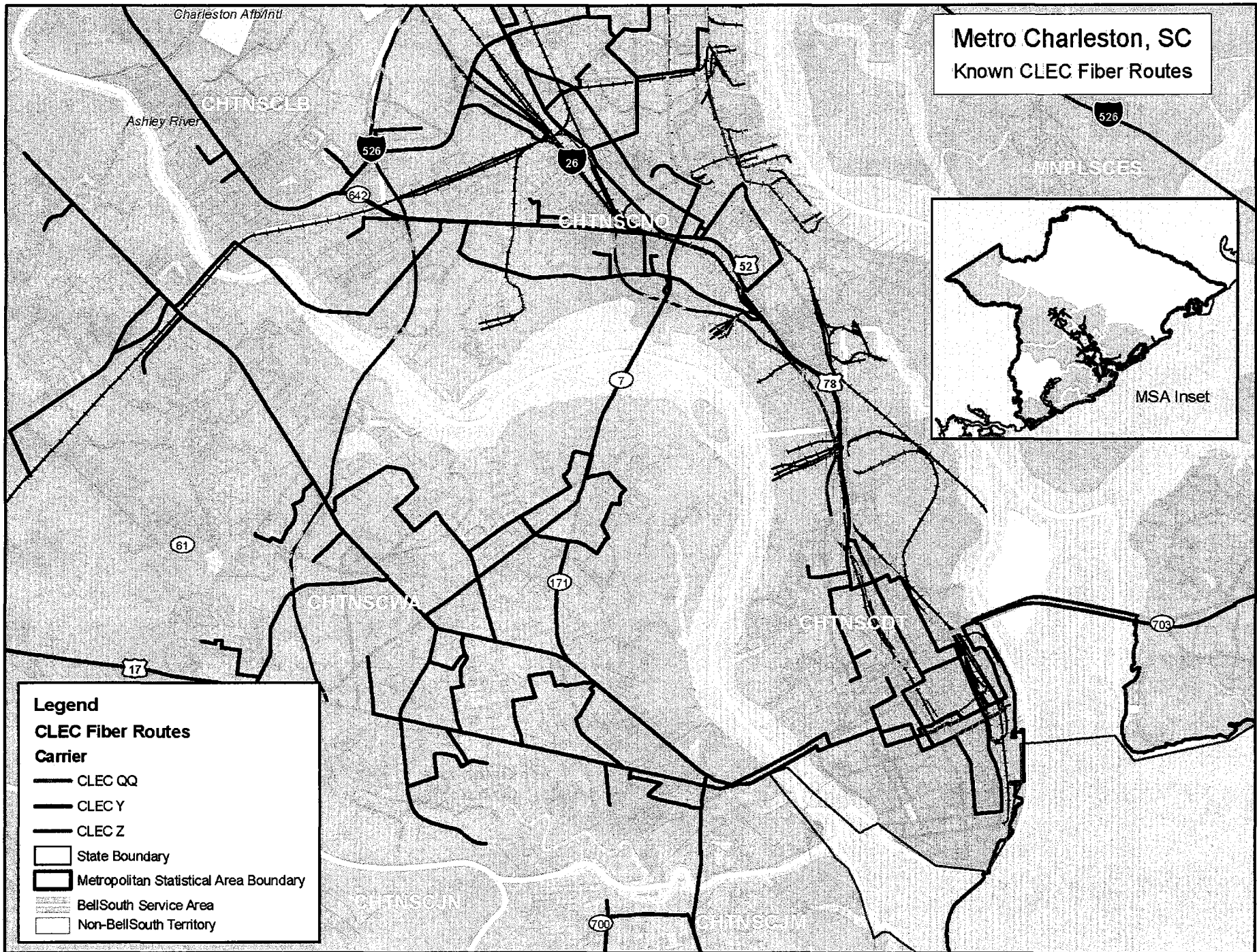
# EXAMPLE COMPETITIVE FIBER PLACEMENT – DOWNTOWN ATLANTA





# EXAMPLE COMPETITIVE FIBER – DOWNTOWN ATLANTA





# FIBER BASED COLLOCATION IN BELLSOUTH CENTRAL OFFICES

Central Offices By No. of Business Access Lines	No. of Central Offices	Percent of Central Offices	Number of Fiber-Based Collocators				
			0	1+	2+	3+	4+
Below 5,000	1145	72.8%	96.9%	3.1%	1.0%	0.1%	0.1%
5,000-10,000	199	12.6%	45.2%	54.8%	25.1%	11.1%	4.5%
10,000-15,000	94	6.0%	22.3%	77.7%	53.2%	36.2%	17.0%
15,000-20,000	56	3.6%	17.9%	82.1%	75.0%	66.1%	53.6%
20,000-25,000	32	2.0%	3.1%	96.9%	84.4%	81.3%	65.6%
25,000-30,000	20	1.3%	0.0%	100.0%	95.0%	95.0%	90.0%
30,000-35,000	9	0.6%	0.0%	100.0%	100.0%	100.0%	100.0%
35,000-40,000	3	0.2%	0.0%	100.0%	100.0%	100.0%	100.0%
40,000-45,000	3	0.2%	0.0%	100.0%	100.0%	100.0%	100.0%
45,000-50,000	4	0.3%	0.0%	100.0%	100.0%	100.0%	100.0%
Above 50,000	9	0.6%	0.0%	100.0%	100.0%	100.0%	100.0%
<i>Total</i>	1574	100%	78.3%	21.7%	14.4%	10.6%	7.8%



The Commission cannot lawfully find impairment in a market where “competition is possible,” whether or not competition has actually developed or has developed to a lesser extent in that market.

*USTA II*, 359 F.3d at 571 & 575

The Commission cannot “simply ignore facilities deployment along similar routes when assessing impairment.”

*USTA II*, 359 F.3d at 575

## **CLECs ADMIT THAT THEY SELF-PROVIDE HIGH-CAPACITY TRANSPORT**

- Advanced Telecom, which operates in four states in the Pacific Northwest, has self-provided transport on 25 of the 40 interoffice routes in its system (62.5%)
- KMC, which operates in 35 mid-size markets, self-provides transport along at least 245 routes in its system
- X/O, Xspedius, AT&T and MCI, which operate in numerous states, self-provide transport, but won't say where or under what circumstances

## **CLECs ADMIT THAT HIGH-CAPACITY TRANSPORT IS AVAILABLE FROM OTHER CARRIERS**

- Eschelon, which serves 12 large and mid-size markets, found that approximately 60% of its collocations are in central offices served by an alternative transport provider and approximately 20% are served by multiple providers
- Broadview, which operates in the northeast U.S., is able to obtain transport from alternative providers along 25% of its routes
- Talk America, which is a facilities-based provider in Michigan, is able to obtain transport from alternative providers along 35% of its routes

## **CLECs ADMIT THAT HIGH-CAPACITY TRANSPORT IS AVAILABLE FROM OTHER CARRIERS (con't.)**

- Advanced Telecom purchases interoffice transport from CLECs on 7% of its system routes and estimates that alternative transport is available along 20% of its system routes



## **CLECs ADMIT THAT THEY SELF-PROVIDE HIGH-CAPACITY LOOPS**

- Bay Ring, which operates in New Hampshire, Massachusetts and Maine, has self-provisioned DS1/DS3 loops
- X/O self-provides DS1/DS3 channels connecting to its backbone network using its own fiber optic facilities
- Xspedius self-provides DS1/DS3 channels connecting to its backbone network using its own fiber optic facilities

## **CLECs ADMIT THAT HIGH-CAPACITY LOOPS ARE AVAILABLE FROM OTHER CARRIERS**

- Advanced Telecom purchases 10% of its DS1 loops in Washington from another CLEC
- According to X/O, CLECs offer DS1/DS3 loops on a wholesale basis in approximately 5% of the buildings X/O serves
- Sprint has identified more than 30,000 buildings in which alternative loop facilities are available

**THIRD-PARTY DATA CONFIRM THE  
COMPETITIVENESS OF THE HIGH-  
CAPACITY SERVICES MARKET (Proprietary)**

**REDACTED**

## **THIRD-PARTY DATA CONFIRM THE COMPETITIVENESS OF THE HIGH- CAPACITY SERVICES MARKET (con't.)**

- Study commissioned by the North Carolina Utilities Commission found that:
  - CLECs serve 60% of the non-switched digital private line – DS1 or greater connections in North Carolina, the vast majority of which (87.3%) are served through the CLECs' own facilities
  - CLECs have a 58% share of the switched DS1 service market in North Carolina, a substantial portion of which (32.2%) is served through the CLECs' own facilities

The Commission's impairment analysis cannot ignore the  
ability of competitors to "self-provision."

*AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. at 389



## **A LOOP TEST THAT REQUIRED A WHOLESALE ALTERNATIVE WOULD BE UNLAWFUL**

- A test that requires the presence of a wholesaler in a building would ignore the ability of CLECs to “self-provision,” contrary to the Supreme Court’s ruling
- Such a test would allow the business decisions of entrants to dictate impairment, contrary to the Supreme Court’s ruling
- Such a test would assess impairment based on whether CLECs have alternatives, and not whether consumers have alternatives, as the D.C. Circuit has required
- Such a test would misconstrue the requirements of § 251(d)(2), which focuses on the “ability” of competitors to offer service without UNEs, regardless of whether that competitor has chosen to become a wholesaler

## **HIGH-CAPACITY LOOP ALTERNATIVES**

- Central office approach is consistent with *USTA II*
- Nationwide finding of impairment would be legally unsustainable given evidence of self-deployment, intermodal competition, and special access availability
- Building-by-building approach is administratively unworkable

The Commission's impairment analysis "cannot ignore  
intermodal alternatives."

*USTA II*, 359F.3d at 572-573

## **EXTENSIVE INTERMODAL COMPETITION EXISTS FOR HIGH-CAPACITY SERVICES**

- A recent In-Stat/MDR study found that 41% of enterprises, 32% of middle market businesses, and 44% of small businesses were using cable modem service for high-capacity services
- Top cable companies currently provide high-capacity services to hundreds of thousands of business customers
  - Cox provides high-capacity service to more than 100,000 business customers in 18 markets nationwide
  - Time Warner Cable provides high-capacity service to more than 149,000 business customers nationwide

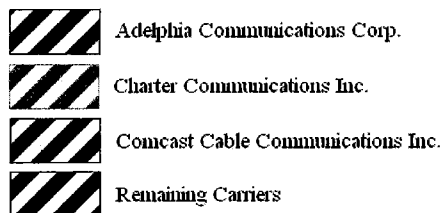
## **EXTENSIVE INTERMODAL COMPETITION EXISTS FOR HIGH-CAPACITY SERVICES (con't.)**

- Cable networks pass numerous businesses, and cable operators are aggressively extending their fiber to large office buildings
  - 60% of small to middle market businesses are located within a few hundred feet of a cable network, and 25% already have a cable drop
  - According to Cox, more than 320,000 businesses with a total telecom spend of \$3.3 billion annually lie within 100 feet of Cox's network
  - Cox expects to reach 25% of businesses within its franchise by end-of-year 2004

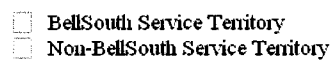


### Cable Modem Service Availability

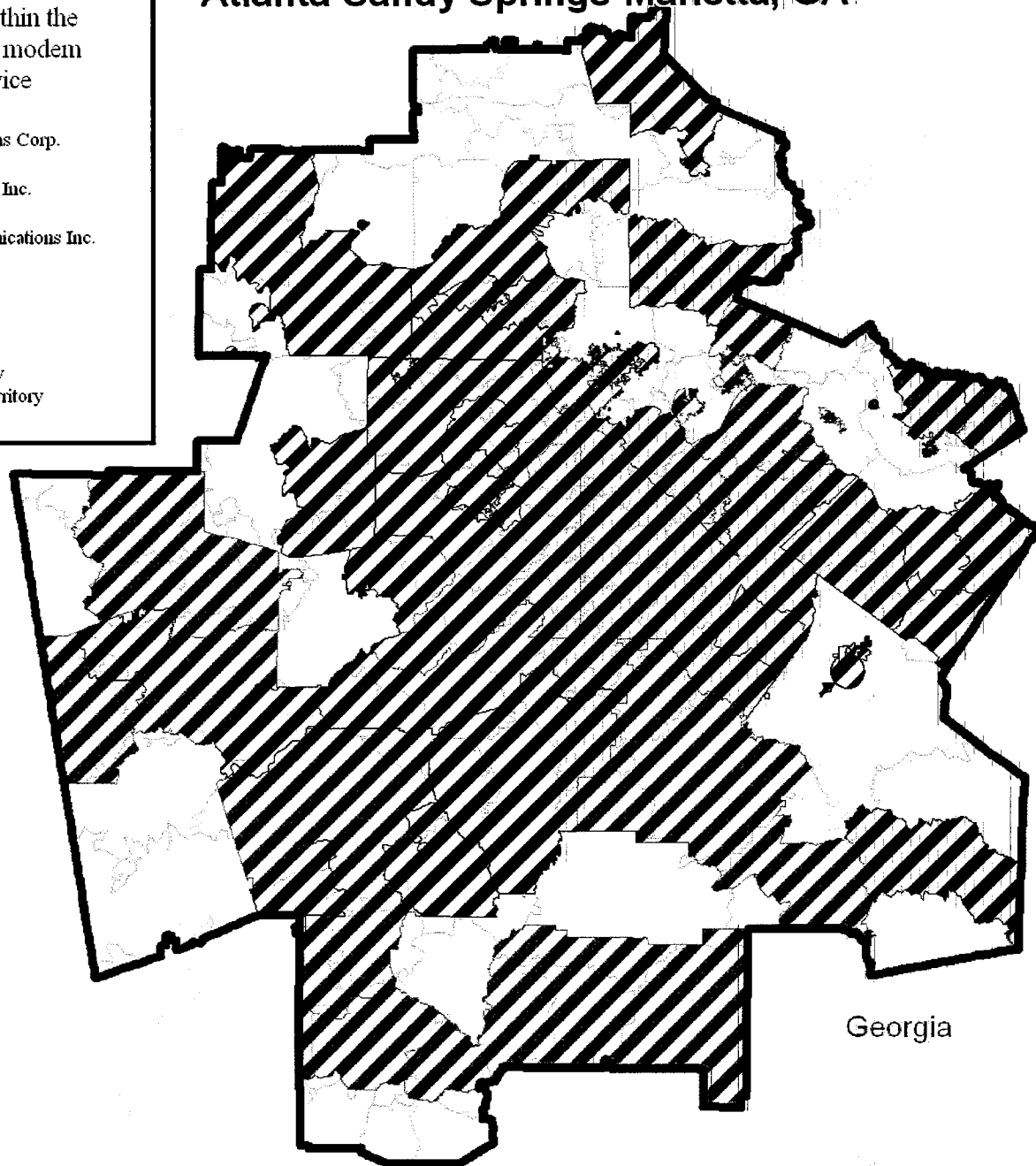
88% of the households within the MSA have access to cable modem service and VoIP service



#### Within MSA Boundary



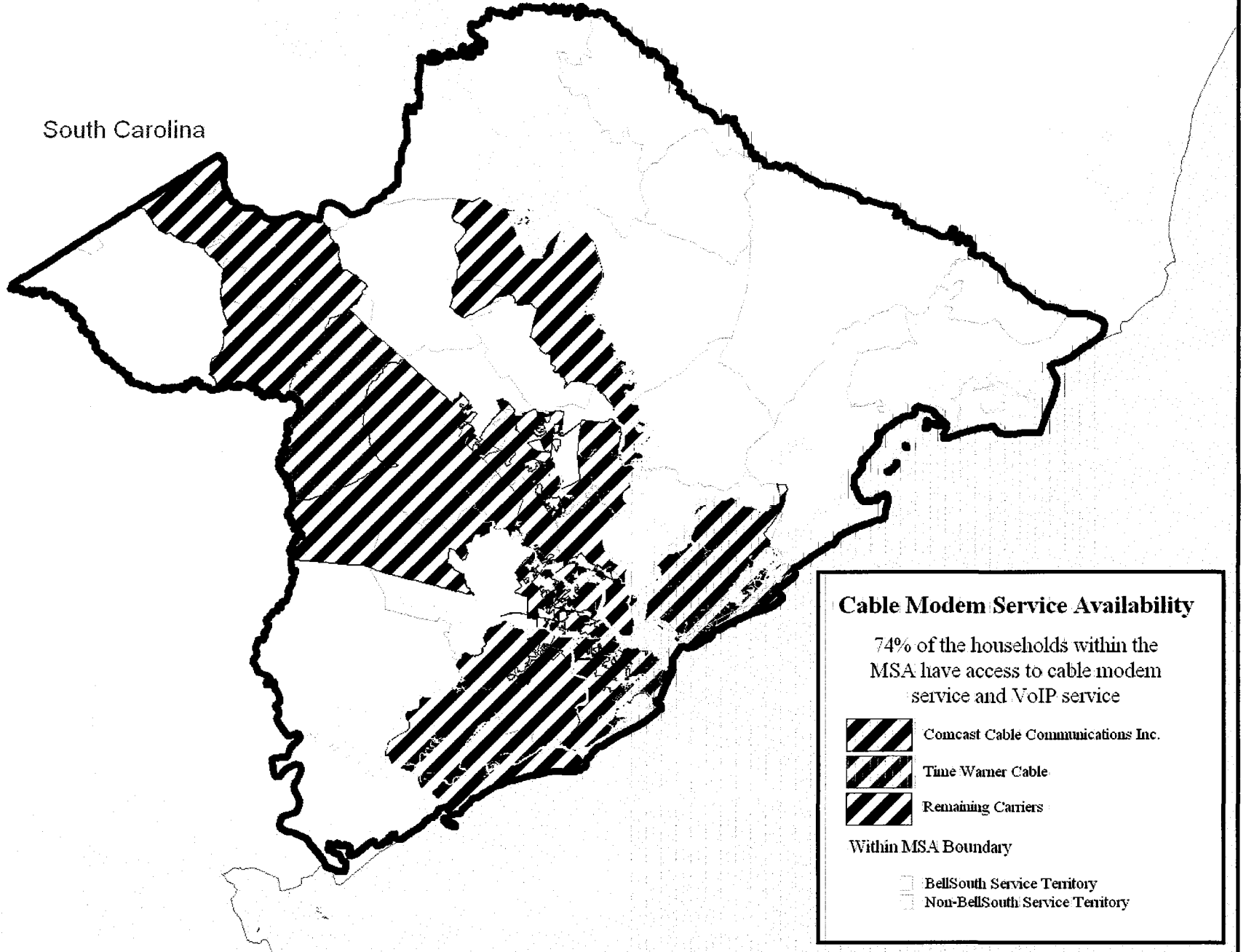
### Atlanta-Sandy Springs-Marietta, GA



Georgia

## Charleston-North Charleston, SC

South Carolina



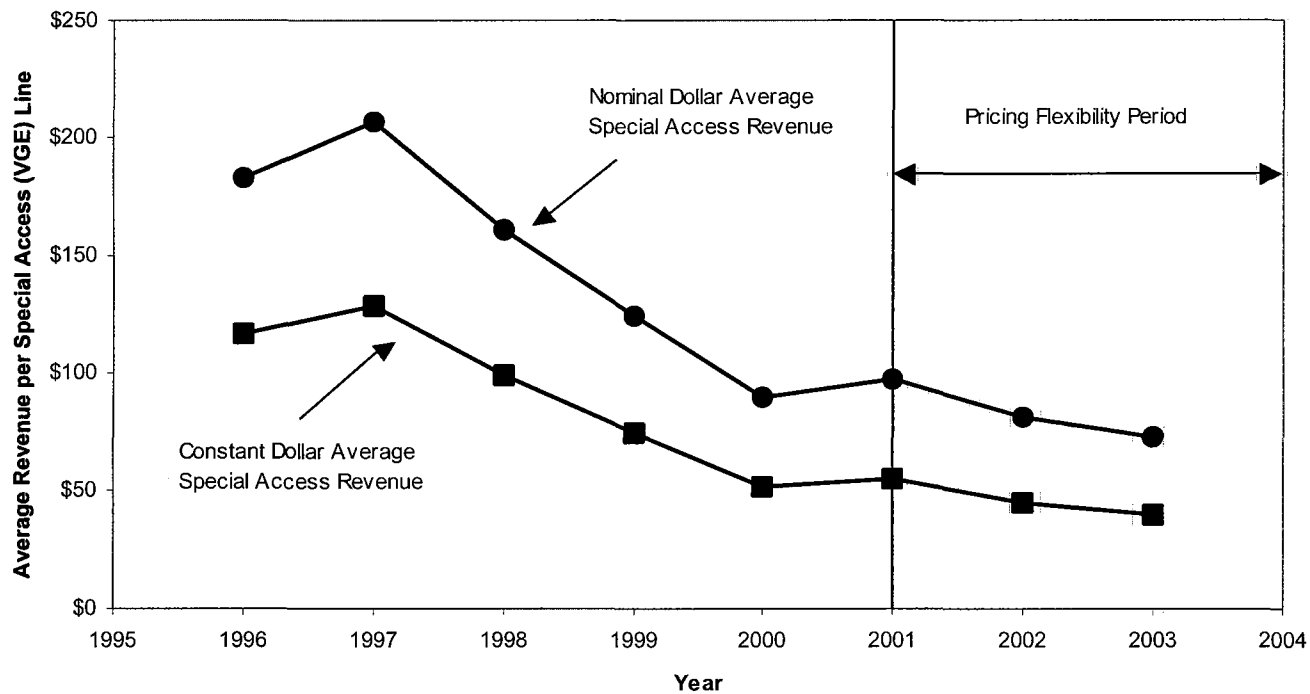
The Commission “must consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired...”

*USTA II*, 359 F.3d at 577

## **CLECs ARE COMPETING SUCCESSFULLY FOR HIGH-CAPACITY SERVICES USING SPECIAL ACCESS**

- CLEC use of special access is extensive
  - In BellSouth's region, there are 106,640 buildings served by CLECs using DS1 circuits either purchased as special access, UNEs, or both
  - 55,240 of these buildings (51.8%) are served exclusively by special access, and 12,050 (11.3%) are served by both special access and UNEs
  - 70% of all DS1 circuits purchased from BellSouth are in the form of special access
- Special access prices have fallen

# BELLSOUTH'S SPECIAL ACCESS REVENUE (PER VOICE GRADE EQUIVALENT SPECIAL ACCESS LINE), 1996-2003

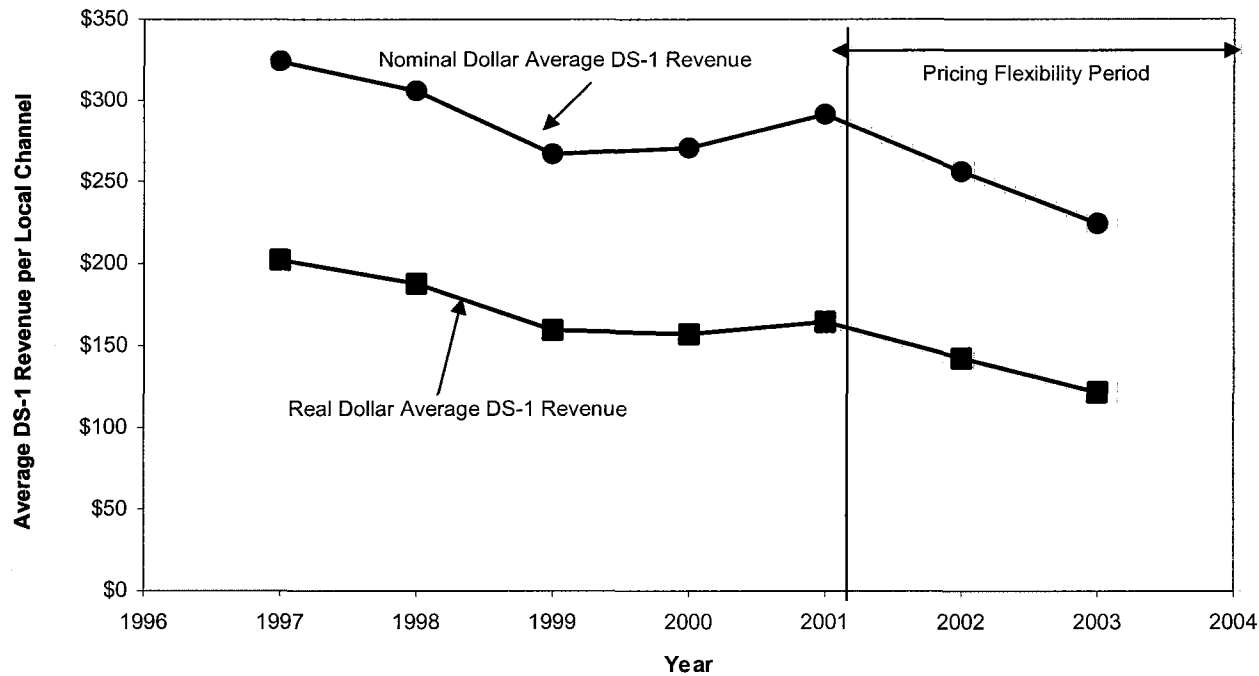




# **COMPOUND ANNUAL GROWTH RATE OF BELLSOUTH'S REVENUE PER SPECIAL ACCESS (VOICE GRADE EQUIVALENT ) LINE**

Period	Nominal CAGR	Real CAGR
Full Period (1996-2003)	-12.36%	-14.33%
Price Caps (1996-2001)	-11.84%	-13.95%
Pricing Flexibility (2001-2003)	-13.65%	-15.29%

# BELLSOUTH'S DS-1 REVENUE PER LOCAL CHANNEL, 1997-2003



## **COMPOUND ANNUAL GROWTH RATE OF BELLSOUTH'S REVENUE PER DS-1 LOCAL CHANNEL**

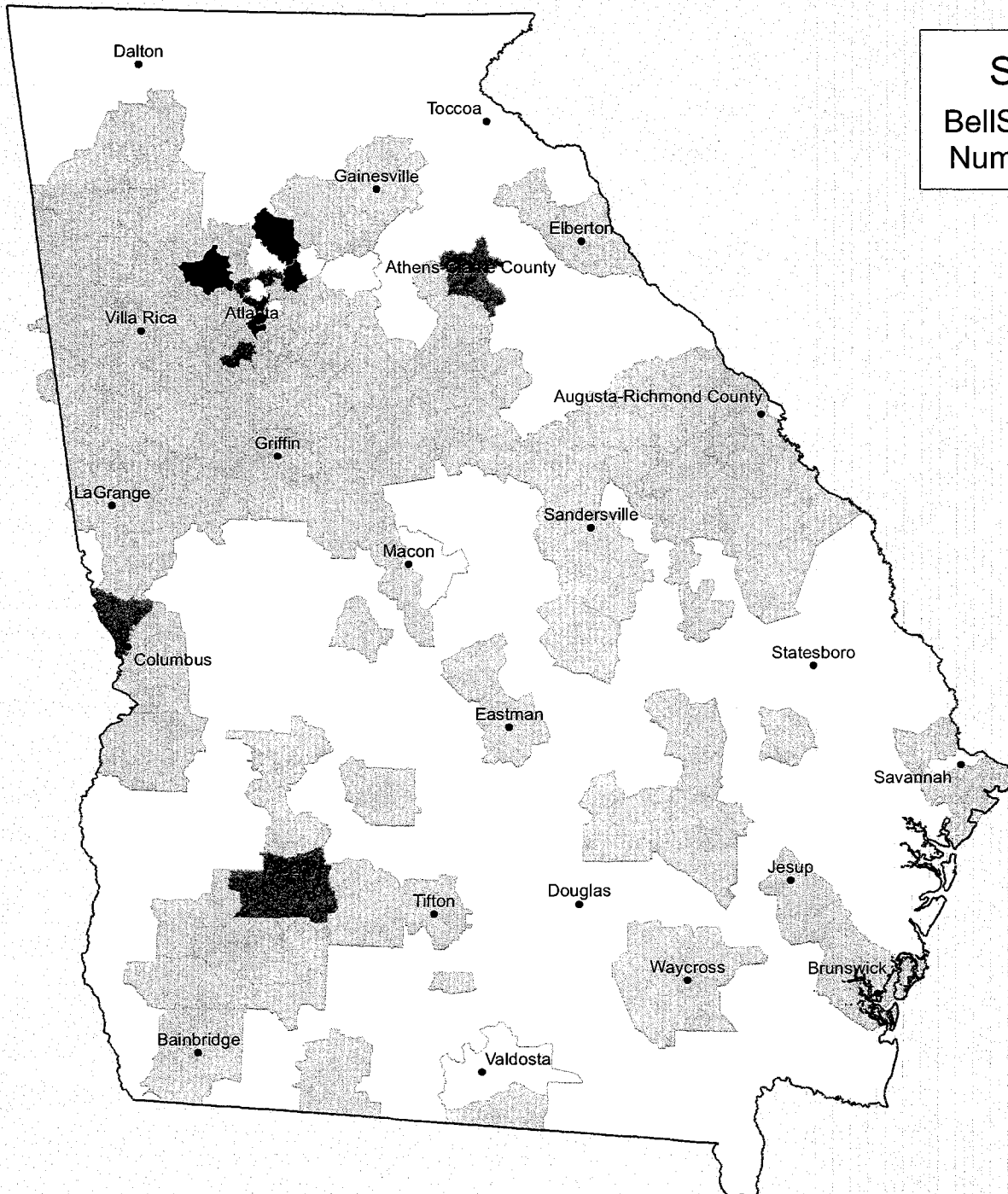
Period	Nominal CAGR	Real CAGR
Full Period (1997-2003)	-5.94%	-8.06%
Price Caps (1997-2001)	-2.59%	-4.96%
Pricing Flexibility (2001-2003)	-12.30%	-13.96%

## **SPECIAL ACCESS CONVERSIONS SHOULD BE PROHIBITED**

- No conversion rule would be consistent with D.C. Circuit's impairment standard because a carrier using special access to serve a customer cannot be impaired without access to UNEs to serve that same customer
- No discrimination issue because carriers utilizing special access to serve customers are not similarly situated to those carriers that rely upon UNEs

# State of Georgia

## BellSouth Wire Centers by Number of Business Lines



### Legend

- City/Place
- State Boundary

### BellSouth Serving Area

- < 20000 Business Lines
- 20000 - 25000 Business Lines
- 25001 - 30000 Business Lines
- 30001 - 35000 Business Lines
- 35001 - 40000 Business Lines
- 40001 - 45000 Business Lines
- 45001 - 50000 Business Lines
- > 50000 Business Lines

# State of Florida

## BellSouth Wire Centers by Number of Business Lines

### Legend

• City/Place

□ State Boundary

#### BellSouth Serving Area

□ < 20000 Business Lines

□ 20000 - 25000 Business Lines

■ 25001 - 30000 Business Lines

■ 30001 - 35000 Business Lines

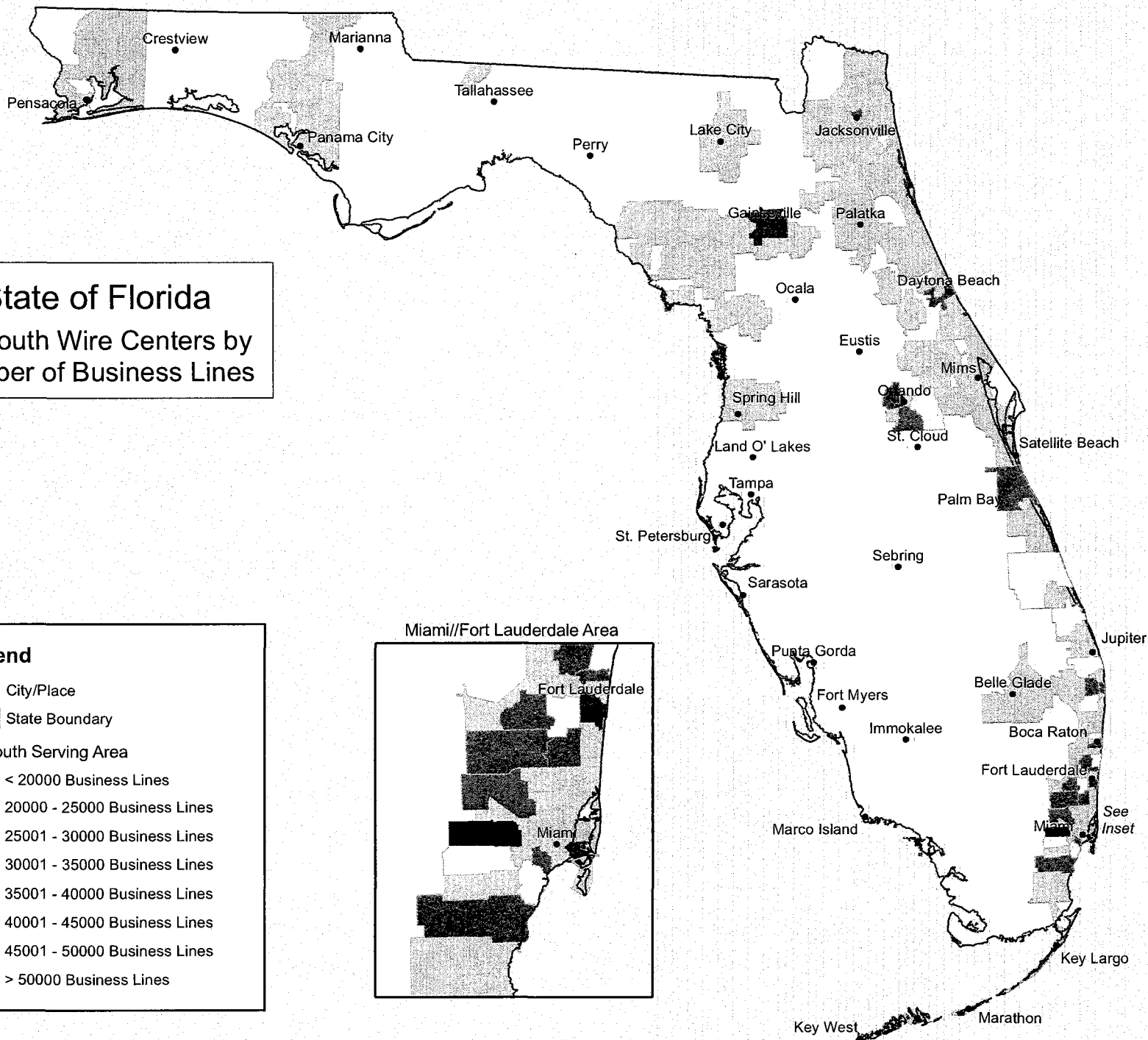
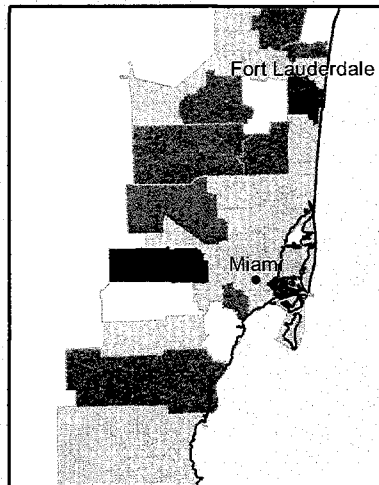
■ 35001 - 40000 Business Lines

■ 40001 - 45000 Business Lines

■ 45001 - 50000 Business Lines

■ > 50000 Business Lines

### Miami//Fort Lauderdale Area



## **UNE-P TRANSITION**

- No new adds upon adoption of UNE rules
- Proposed transition mechanism is reasonable

## **OTHER ISSUES THE COMMISSION MUST ADDRESS**

- Interplay of Section 251 and 271 and role of state public service commissions
- Non-251 commercial agreements and role of state public service commissions
- Implementation of new UNE rules and change of law process